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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEKSAN MKRTCHYAN, Petitioner - Appellant, v. TERRY E. WAY, USCIS Nebraska District Director; ROBERT J. OKIN, Seattle USCIS District Director; TOM RIDGE, Secretary of the U.S. Department of Homeland Security; ALBERTO R. GONZALES, Attorney General, Respondents - Appellees.	No. 04-35646 D.C. No. CV-04-00323-TSZ MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted June 15, 2005.
Memorandum Disposition Filed Nov. 8, 2005.
Petition for Rehearing Granted and Disposition Withdrawn March 23, 2006.
Resubmitted August 15, 2006[**]
Filed August 25, 2006

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: PREGERSON, GRABER, and GOULD, Circuit Judges.

Aleksan Mkrtchyan, a native and citizen of Armenia, appeals the district court's denial of his petition for habeas corpus. In his petition, Mkrtchyan argued that the Board of Immigration Appeals ("BIA") erred in affirming an immigration judge's ("IJ") denial of his applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We have jurisdiction under 8 U.S.C. § 1252(a).

On May 11, 2005, while this case was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310-11 (amending 8 U.S.C. § 1252). The Act amends the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), by eliminating federal habeas jurisdiction in favor of petitions for review that raise "constitutional claims or questions of law." REAL ID Act § 106(a)(1). Consequently, we construe Mkrtchyan's habeas petition as if it were a petition of review. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005). We review *de novo* questions of subject matter jurisdiction. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002).

If a petitioner wishes to appeal a removal order, the proper procedure is to file a petition for review with this court. *See* 8 U.S.C. § 1252(b)(2). That petition must be filed within thirty days after the date of the final order of removal. *See* 8

U.S.C. § 1252(b)(1). After that period, § 1252(d)(1) provides that "[a] court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien as of right . . . ." 8 U.S.C. § 1252(d)(1).

Mkrtchyan maintains that he is excused from strict compliance with § 1252(d)'s exhaustion requirement because he suffered ineffective assistance of counsel. Mkrtchyan contends that he was unaware of the BIA's decision because his former counsel failed to tell him that the BIA had affirmed the IJ's decision.[1] Even so, the proper course once he received notice was to file a motion to reopen with the BIA his immigration proceedings to bring the ineffective assistance claims before the IJ. *See Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) (recognizing that a motion to reopen is the proper avenue for pursuing claims of ineffective assistance); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000) (holding that ineffective assistance of counsel claims must first be presented

[1] The record suggests otherwise. Mkrtchyan signed a certified mail receipt attached to the Warrant of Removal and Bag & Baggage letter informing him that the BIA had affirmed the IJ's decision. The certified mail receipt is in the record, and Mkrtchyan later admitted the letter's existence to immigration officers.

to the BIA in a motion to reopen).[2] Because Mkrtchyan failed to exhaust his administrative remedies by filing a motion to reopen, we lack jurisdiction to review the merits of his claims.

The mandate in this case will issue no sooner than fifty-two days from the date this memorandum disposition is issued. In the interim, Mkrtchyan, the husband of a U.S. citizen, may pursue any avenue of relief for which he is entitled to apply.

PETITION DISMISSED.

[2] Although motions to reopen should be filed within ninety days of the BIA's decision, the deadline may be tolled until the petitioner learns of the ineffective assistance. *See Singh v. Ashcroft*, 367 F.3d 1182, 1185-86 (9th Cir. 2004); *Liu v. Waters*, 55 F.3d 421, 424 (9th Cir. 1995) (recognizing that absent "special circumstances," judicial review is not appropriate until the petitioner has first raised the grounds for appeal before the IJ or the BIA). Mrktchyan offers *no* explanation for not filing a timely motion to reopen – much less, for not filing one at all.